IN THE

Supreme Court United States.

No. 885.

WILLIAM H. PLATT

vs.

THE UNION PACIFIC RAILROAD COMPANY and FRED. L. AMES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR APPELLEE

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This case is brought into this court by the appeal of William H. Platt, the complainant in equity, from the decree of the court below dismissing the bill.

The case was heard upon the bill and answer alone, without any evidence on either side. A stipulation was filed in the case, before hearing, (Record, p. 29,) in the following words:

"It is hereby stipulated by and between the respective parties, complainant and defendant, that this case may and shall be set down for final hearing on the bill and answer herein heretofore filed, and without other or further pleadings and proofs, all exceptions or objections thereto, in matter of form merely, being hereby waived.

(Signed,) E. WAKELEY, Sol'r for Complainant.
A. J. POPPLETON, Sol'r for Defendants."

[Filed October 3, 1878.]

On the 4th day of October, 1878, (Record, p. 29,) the court dismissed the bill upon the merits.

The bill was filed on the 28th day of September, 1878. The answer was filed on the 2d day of October, 1878, and is the joint answer of the Union Pacific Railroad Company and Fred. L. Ames, the latter party being the trustee under the mortgage hereinafter mentioned, which was made by the Union Pacific Railroad Company originally to Cyrus H. McCormick and John Duff; and said Ames, upon the the resignation of said McCormick and Duff, became the trustee under the mortgage in their place. (Record, p. 13.) The following facts are shown, and either admitted, or in legal effect established by the pleadings:

First. That the complainant, Platt, is a citizen of the State of Nebraska and that the defendant, the Union Pacific, is a corporation, having its principal place of business in Boston, Massachusetts. That the complainant is the head of a family, etc., and qualified, under the laws of the United States, to become a pre-emptor upon the public lands. (Record, pp. 1, 9.)

Second. That the land in question, to wit, the south half of the northwest quarter, and the west half of the northeast quarter, of section 15, township 11, north of range 9 west, situate in Hall county, State of Nebraska, was on the 1st July, 1862, part of the public lands which had been surveyed, and to which the Indian title had been extinguished. (Record, pp. 1, 9.)

Third. That the defendant company was incorporated under the act of July 1, 1862, and empowered to locate and construct a railroad and telegraph line, as provided in said act and the acts amendatory thereof; and that there was granted by the United States to the said defendant, to aid in the construction of the said lines, every alternate

section of public land designated by odd numbers, as provided in the said act; and that by the third section of the said act it was further provided, amongst other things, "that all the lands so granted, *which should not be sold or disposed of by the said company within three years after the entire road to be by it constructed should have been completed, should be subject to settlement and pre-emption like other lands of the United States, at a price not exceeding* $1.25 *per acre, to be paid to the said company.*" (Record, pp. 2, 9.)

Fourth. That by the acts of the 2d of July, 1864, and the 3d of July, 1866, said defendant was to locate and construct its road in a continuous line from Omaha westward, until it should connect with and meet the "Central Pacific Railroad of California," which last company was also empowered to construct its road in a continuous line until it should meet the defendant's road. (Record, pp. 2, 9.)

Fifth. That the defendant company, in 1865, commenced the construction of its road near Omaha, near the boundary of Iowa, at a point fixed by the President; and that by the 15th of July, 1869, the defendant's road was so far completed that the track was finished to a junction with the track of the Central Pacific near Ogden; that a commission appointed by the President, as required by law, had accepted the line as completed, and that passenger and freight trains were run upon the same, carrying passengers and freight for hire, as required by its charter; but the answer denies that it was completed within the sense of the last clause of the third section of the act of 1862 until the 14th day of November, 1874. (See Record, pp. 9, 10.)

Sixth. That prior to April 16, 1867, (date of said mortgage,) the defendant had accepted said acts of July 1, 1862, and July 2, 1864; had entered on construction of said road; had definitely fixed the line thereof to a point west-

ward of the land in dispute; and that when said line was so definitely fixed, the lands in controversy were not "sold, reserved, or otherwise disposed of," nor had any pre-emption rights attached thereto; but, on the contrary, by the grant contained in said act of Congress, and by the definite fixing of said route of road to a point westward of said tract, and by filing a map thereof in the Interior Department, (it is claimed that) the title of said tract became vested in defendant. (Record, pp. 10, 11.)

The said road was, before said April 16, 1867, completed in all respects, according to law, to a point about two hundred miles westward of the Missouri river, and to a point west of the lands in suit. (Rec., p. 11.) Said lands in suit were within ten miles of the route of said road; were set off according to law to said defendant, and on March 26, 1875, were conveyed by the patent of the United States to the defendant, in pursuance of said acts of Congress. (Record, p. 3.)

The answer expressly denies the averment of the bill, made on page 3 of the record, that the said lands have, since July, 1872, been subject to settlement and pre-emption like other lands, at $1.25 per acre; also the averment (same page of record) that the said lands in suit have not been at any time "sold or disposed of" by the defendant company, and avers, *on the contrary, that "on the 16th day of April, 1867, the defendant company sold and disposed of said lands within the true intent and meaning of the third section.*

Seventh. In more specific denial of the averment of the bill that the lands in suit had not been disposed of within three years after the completion of defendant's road, the answer (Record, p. 11) avers, that "on the 16th of April, 1867, the title in and to said tract being so vested in said defendant company as aforesaid, said defendant company, for the purpose of raising money necessary to continue and complete the construction of their said road, in

accordance with the act of Congress authorizing and requiring such construction and completion, caused to be issued its coupon bonds of the denomination of one thousand dollars each, and to the amount of ten million four hundred thousand dollars, ($10,400,000,) payable twenty years from date at the office of said company, in the city of New York, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first day of April and October of each year, on presentation of coupons at the office of the defendant company, in the said city of New York." (Record, p. 11.)

The answer (Record, 11) proceeds further to aver, that on the same day, for the securement of the said coupon bonds according to their tenor, the defendant, in due form of law, caused to be executed an instrument of writing for securing the money on said bonds, and interest, in consideration of one dollar, which mortgage "granted, bargained, sold, released, enfeoffed, conveyed, and confirmed unto two certain trustees—to wit, Cyrus H. McCormick, of Chicago, Illinois, and John Duff, of Boston, Massachusetts—all and singular the said several sections of land granted to said defendant company by the several acts of Congress hereinbefore referred to, including the said tract described in complainant's bill, and also all the estate, right, title, interest, claim, and demand whatsoever at law or in equity of, in, or to the same or any part thereof then held by the defendant company, or which it might thereafter acquire, hold, own, or become entitled to, by force or virtue of the said acts of Congress upon the trusts following, to wit." (See Record, pp. 11, 16.)

The answer then proceeds to state the substance of the said mortgage, which mortgage will be found in the printed record, pages 14 to 21, inclusive.

The provisions of this instrument, upon which it may be necessary to comment, we will notice in the body of the argument.

Eighth. The answer then proceeds to aver that said mortgage was lawfully acknowledged and delivered to the trustees, and that the trust was, in due form of law, accepted; that said trustees entered upon their duties as such; and that said mortgage, before the first of July, 1872, was recorded in the records of deeds in each of the counties through which the said railroad passes, and in said Hall county, in which the land in controversy is situate.

That of the bonds and coupons which the said mortgage was given to secure, there remains outstanding in the hands of *bona-fide* purchasers about seven millions of dollars, unsatisfied and unpaid. (Record, p. 12.)

That the defendant's road, on the 5th of July, 1867, was completed to a point 385 miles west of the Missouri river, and had been accepted by the President in accordance with law. (Record, p. 12.)

The answer alleges that said instrument, so executed as aforesaid to secure said bonds and coupons, was a sale and disposition of the lands in controversy within the sense of the third section of the said act of July 1, 1862, and that said lands have not been subject to pre-emption by the complainant or any other person. The answer, (Record, p. 13,) in admitting, except as thereinafter set forth, the averments of paragraphs 7, 8, and 9 of complainant's bill, in effect admits that the complainant took the requisite steps to become a pre-emptor upon the lands in controversy; that he made due proof of his pre-emptive rights; that he paid for the said lands in suit $1.25 per acre to the receiver of the United States; that such receiver receipted for the same, and holds said money for the use of the defendant, and that defendant refuses to receive the same; and that the appellant is in possession of the said lands in controversy, (Record, pp. 3 to 6, inclusive,) and that the premises involved in this suit are of the value of at least twelve thousand dollars. (Record, p. 4.)

Ninth. That on the 4th day of September, 1878, the defendant commenced, in the Circuit Court of the United States for the district of Nebraska, an action of ejectment to recover possession of the lands in controversy, in which ejectment defendant in this suit (plaintiff in ejectment) alleges that it holds the title in fee in the said lands, and the right of possession thereof; and that the appellant unlawfully deprives the plaintiff in ejectment of said possession.

Tenth. The bill alleges that the legal title is in the Union Pacific Railroad Company; that, therefore, the defendant in ejectment cannot make the perfect equitable title, which he claims in virtue of his pre-emptive rights and purchase, available in the ejectment suit; that he is therefore remediless in that suit; that the recovery in ejectment will subject him to an irreparable injury by reason of the dispossession in ejectment; that said Ames claims some interest in said land as mortgagee or trustee, but that such interest, if any he has, is subject to said pre-emptive rights, because said Ames' interest is subject to the conditions and limitations prescribed in said acts of Congress; and prays for an injunction staying the proceedings in ejectment until the final hearing of this case; and that on the final hearing it may be decreed that title held by the Union Pacific Railroad Company in said land is held in trust for the defendant in ejectment, and that the said railroad company be required to convey the same, and in default of conveyance by said company, that conveyance may be decreed to be made to defendant in ejectment by some officer appointed by the court. (Record, pp. 6, 7.)

The answer denies that the complainant, in virtue of his said settlement, occupation, and improvement of said lands, and the said steps admitted to have been taken under the pre-emption laws, whereby he attempted to purchase and pay for the same under such laws, acquired any pre-emp-

tive rights under the said laws; and alleges that the said conveyance of the 16th of April, 1867, under all the terms, facts, considerations, and conditions connected with and arising out of the same, under the acts of Congress, became and was a sale and disposition of the said lands within the meaning of the third section of said act of July 1, 1862, and that the appellant (defendant in ejectment) has no interest therein.

Said answer further alleges, (page 13,) that "when defendant company was called on to furnish information whether the same had been sold or disposed of within three years from the date of the completion of the said road," said defendant company answered as follows, and not otherwise: "That the said tract had not been sold to a *private* purchaser, but had been, within the said years, mortgaged to secure the payment of a sum of about ten millions of dollars," as fully set forth in the said answer.

Said mortgage of the 16th of April, 1867, is made part of the defendant's answer, and is exhibit "A." (See Record, p. 12.)

The above-recited facts are believed to be all that are material in this case, including in such facts those disclosed by the face of the mortgage, exhibit "A," which is part of the answer.

All the material averments of the answer are directly responsive to the averment of the bill, which alleges that the defendant did not "sell or dispose of" the lands in suit within three years after the completion of the defendant's road, as contemplated by the third section of the act of Congress of July 1, 1862. (12 Stats., 492.)

Every averment of fact being so responsive to the bill, is, therefore, to be taken as an established fact in the case, there being no evidence contradicting the answer. This is the general rule of equity practice. (Carpenter *v.* Insurance Company, 4 How., 217, 218.)

The forty-first rule of equity practice in the courts of

the United States (Phill. Prac., 520) changes this only in cases where the parties do not "set down the case for hearing on bill and answer alone." In this case the parties did (see Record, p. 29) set their case down for hearing on bill and answer; and hence, the averments of the answer, which are responsive to the bill, are all established as facts in the case.

The Ultimate Facts in the Record.

The result, therefore, of the pleadings in the case is to present to the court as the ultimate facts, either admitted or established, in favor of or against the respective parties, the following:

For the complainant, that in 1874 (Record, p. 3) he took possession of the lands in suit as a pre-emptor; has made the necessary improvements thereon, and done all other things required under the pre-emption laws to entitle him to purchase the lands as a pre-emptor; has established by due proofs, before and under the regulations of the proper officials of the land office, his right to pre-empt the land, if it has been subjected, as he claims, to pre-emption; that the said officials have decided complainant entitled as he claims; and that he has paid for the land as such pre-emptor, and holds the receipt of the land office therefor; and that the defendant has sued in ejectment to dispossess him, in virtue of the legal title in the lands, held by the defendant from the United States, under the grant contained in the third section of said act of July 1, 1862, and the amendatory acts, and under the patent of the 26th of March, 1875; and that the parties complainant and defendant are citizens of different States.

For the defendant, the ultimate facts of the record are: That defendant company is a corporation organized under said act of Congress of July 1, 1862, having its principal office of business in Massachusetts; that the lands

in suit are part of the lands conveyed to said company by the third section of said act, under the words "that there *be and is hereby granted* to the said company, *for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon*"; that before the 16th April, 1867, the defendant company had done every act required by law to entitle it to the said grant of lands under said third section, and that, in virtue of said facts and of said acts of Congress, the title to said lands, including that in suit, had before said date vested in defendant company; (Record, pp. 10 11;) that on 16th April, 1867, the defendant company "sold and disposed of" the lands in suit, along with other lands, by making the bonds for ten millions four hundred thousand dollars, and the mortgage securing the same, which is exhibit "A," these being made, and the proceeds thereof being used, for the purpose of completing said road as required by said acts; that said bonds were sold in the markets of the world to *bona-fide* purchasers, and about seven millions of dollars of the same are still outstanding; that said road was completed in November, 1874, and that said defendant company's road and telegraph line are performing, and have performed, all the acts required of the defendant to fully entitle it to the full ownership of said land in suit, under said acts of Congress, and that the proper officers, charged with the duty of deciding upon such performance, and granting the patent for said land under the fourth section of said act of 1862, have decided that the defendant hath so performed and become entitled to said land and to a patent therefor; and on the 26th of March, 1875, duly and in pursuance of law issued a patent to defendant for said land; and that, as averred in the bill, the ejectment suit was brought to recover possession of said lands in suit.

Statutes of the United States Brought into View.

The most material statutory provisions brought into view by this case are the following:

Section 3, act of 1st July, 1862, (12 Stats., 492,) provides: "That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile, on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. * * * And all such lands so granted by this section which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company."

The fourth section of said act of 1862 provides (12 Stats., 492): "That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, * * * the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company on each side of the road as far as the same is com-

pleted to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed."

By the fourth section of the amendatory act of July 2, 1864, the number of sections granted by the third section was changed from "five" to "ten" sections per mile, and the limits of the land grant were changed from "ten" to "twenty" miles on each side of the road; and the sixth section of the said act of 1864 (13 Stats., 359) amended said fourth section of the act of 1862, so that upon the construction of "twenty" consecutive miles of the said road, they should be entitled to the said patents instead of "forty," as provided in said fourth section of the act of 1862.

By the fifth section of the act of 1862, upon the completion of forty consecutive miles (changed to twenty miles by the tenth section of the act of 1864) of said road, it was provided that United States bonds, of a thousand dollars each, bearing six per cent. semi-annual interest, due at thirty years from date, should issue by the Secretary of the Treasury to the defendant company, to the amount of sixteen bonds per mile; (a larger amount per mile being allowed for the region of the mountains by the eleventh section;) and the said fifth section of the act of 1862, touching the securement of the said bonds of the United States, made provision in these words:

"And to secure the repayment to the United States, as hereinafter provided, of the amount of the said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds or any part of them when required

so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which at the time of said default shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States: *Provided*, This section shall not apply to that part of any road now constructed."

The tenth section of the act of 1864 (13 Stats., 360) provides:

"That section five of said act be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act and the act to which this act is an amendment, issue their first-mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest, with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies and public stores for the government of the United States. And said section is further amended by striking out the word 'forty' and inserting in lieu thereof the words 'on each and every section of not less than twenty.'"

Any other facts or provisions of law brought into view in the consideration of the case, we will state as we proceed with the argument.

By what has now been stated, it will be seen that the single question presented by this record for the decision of this court is,—Whether the lands in suit have been so lost or forfeited by the defendant, and its grantees or mortgagees, (McCormick and Duff,) and their successor, (Ames,) as that they have ceased to have any interest therein, and so as that, by and under the last clause of the said third section of the act of 1862, the said land is restored to the body of the public lands of the United States, and subjected to pre-emption?

The defendant maintains as its first proposition, making in itself a complete defense in this case, that the making, acceptance, and delivery of the mortgage, (exhibit "A" in the answer,) under all the facts, circumstances, and conditions set forth, was a disposal of said lands within the said third section of the said act of 1862; and hence, that said ownership and interest of the grantees under said acts of Congress and patent of the United States have not been lost, nor said lands restored to the public domain.

In support of this proposition, we state and rely upon the following:

HOW ACT OF 1862 CONSTRUED.

That the provision in said third section making the lands therein granted "which shall not be sold or disposed of by said company within three years after the entire road shall have been completed," subject to pre-emption, must be interpreted in connection with and in the light of (1) the declared objects of the grant, to wit, "for

the purpose of aiding in the construction of said railroad and telegraph line" (12 Stats., 492, sec. 3); and (2) in the light of the other provisions of said act, and of the act *in pari materia* of July 2, 1864 (1 Otto, 350); and (3) in the light of all the facts and circumstances under which the grant of the lands was made, and under which the provision as to their being "disposed of" within three years was attached. (1 Otto, 79.)

Defendant Held General Power to Mortgage its Property.

That these acts of Congress contemplated and bestowed on the defendant the general power to mortgage its property for the purpose of raising money to construct its road, is express and plain on the face of the acts.

In proof of this, observe that the acts *take for granted and assume* the power in the corporation to mortgage its property generally. Thus, for example, when the fifth section of the act of July 1, 1862, makes the subsidy bonds issued by the United States to the company a "*first* mortgage on the property of the road of every kind and description," it is precisely equivalent to saying that the company should have power to make a second and other mortgages of said property of "every kind and description."

So, likewise, the tenth section of the act of 1864, when it authorizes a first mortgage by defendant company equal to the subordinate mortgage in favor of the United States, takes for granted and assumes the existence of the general and inherent power of the company to mortgage any and all its property, and limits such power only as to the extent to which it may issue "*first mortgage bonds.*" Then, again, the eleventh section of the act of 1864 expressly recognizes this general inherent power to mortgage its property as having existed in the company from its organization. This it does by providing, in substance, that

the defendant should suffer a *deduction* from the amount of the United States guaranteed bonds (made second mortgage bonds by said tenth section of the act of 1864) to which it was entitled, equal to such amount of defendant's bonds as had *theretofore* or as should *thereafter* issue "in such form and manner as in law or equity to entitle the same to *priority or preference* of payment to said guaranteed bonds." But such right to "priority" of payment could be secured only by some act of the defendant equivalent to a mortgage of its property.

Thus the acts stamp upon their face conclusively the general power to mortgage any and all its property. We are not now saying what *extent of property*—whether the fee-simple absolute, or only a fee subject to the pre-emptive condition of this third section—could be mortgaged; but are *now* simply asserting that the power to "*dispose of*" *whatever* property the company *did* own is express on the face of the statute.

Defendant Held Power to Mortgage its Lands.

But it is equally manifest that these acts contemplated the mortgaging of these *lands* so granted to aid in the construction of the road. Many considerations show this. Take some proofs. This same third section carefully states the object of the land grant to be to *aid in the construction* of the road. But the same section three, in express words, recognizes the possibility, and hence *power*, of our continuing to hold these lands for purposes of "*sale*," until *after* our road is *completed* throughout its entire length, and therefore until after the entire means for completion had been in *some* way *secured*. Thus it shows that we, if the lands were to be used to "aid in the construction," might use them *otherwise* than by an absolute "sale," because *that* we might postpone until after the *entire completion*. In other words, we might raise money

to "aid" in making the road by mortgaging the lands, and might "sell" them *after* they received the enhancement in value which should result from entire completion of the road.

SUPREME COURT'S CONSTRUCTION GIVES LIBERAL POWERS TO DEFENDANT.

Again, touching the interpretation of these same statutes, this court says (1 Otto, 79):

"The courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it." (Aldridge *v.* Williams, 3 How., 24; Preston *v.* Browder, 1 Wheat., 120.)

In pursuance of this rule of interpretation, the court proceeds to find out the sense of these acts, by pointing to the times, motives, public ends, difficulties, costs, and other circumstances which characterized this enterprise and affected its completion. The court indicates that the need of the road was deemed so supreme as that the people would have justified Congress in making it by direct vote of public money (1 Otto, 80); that "it was a military necessity"; "that a vast territory between the Missouri and the Sacramento was unpeopled and practically worthless, without the means of access and of transportation" (1 Otto, 80); that "the difficulties of its construction were so great as to be deemed, by intelligent people, insurmountable." (1 Otto, 80.)

Touching the state of the country in which these ceded lands are, the court says: "The scheme was for building a railroad 2,000 miles in length over deserts, across mountains, through a country inhabited by Indians jealous of intrusion upon their rights, and was universally regarded, at the time, as a bold and hazardous undertak-

ing." (1 Otto, 81.) "That the project of building the road was not conceived for private ends; *and the opinion was prevalent that it could not be worked out by private capital alone;* * * * that it were better to *enlist private capital* and enterprise in the project, by offering the *requisite inducements*, than for the United States to take the work into its own hands." (1 Otto, 81.) The scheme contemplated *profit* to *individuals; for without a reasonable expectation of this, capital could not be obtained, nor the requisite skill and enterprise.*" (1 Otto, 81.) "*The act itself was an experiment.*" (1 Otto, 82.) "*If private capital could be enlisted at all, it could only be on conditions which would insure, in case of success, remuneration proportioned to the risk incurred.*" (1 Otto, 83.) "The property was in lands and interest-bearing bonds of the United States." (1 Otto, 83.) "*All* the company's *available means* were *necessary* to the prosecution of the work." (1 Otto, 87.) "The act, as has been stated, was passed in the midst of war, when the means for national defense were deemed inadequate, and the public mind was alive to the necessity of uniting by iron bands the destiny of the Pacific and Atlantic States." "*Confessedly the undertaking was beyond the ability of unaided private capital.* Only by the helping hand of Congress could the problem, difficult of solution under the most favorable circumstances, be worked out. Local business, as a source of profit, could not be expected while the road was in course of construction, on account of the character of the country it traversed, and whether, when completed, it would prove valuable as an investment, was a question for time to determine." (1 Otto, 88.) "If the terms offered by Congress are deemed too liberal *now*, they were then considered, with the lights before it, not more than sufficient to engage the attention of enterprising men, who, if not themselves possessing capital, were in a position to command the use of it. These terms look

to ultimate security rather than immediate reimbursement, *inasmuch as the corporation would require all its available means in construction.*" (1 Otto, 88, 89.) "That of necessity there were risks to be taken in aiding with money or bonds an enterprise unparalleled in the history of any free people, the completion of which, if practicable at all, would require, as was supposed, twelve years. The grant of lands, however valuable after the road was finished, could not be available as a resource for building it." (1 Otto, 89.)

Now, this picture from the opinion of this court of the physical, political, and financial conditions out of which this system of legislation sprang, and out of which the defendant company came into life, is a strong and accurate one. It is one drawn by this court for the legitimate purpose of construing these acts and obtaining their just sense. The legal conclusion drawn by the court from the conditions stated, is this: That the Congress meant to grant *liberal* inducements to private capital to embark in this vast and most hazardous enterprise, and that the statutes must receive their interpretation in *that* light. By the unanimous judgment of this court, this is now the *rule of interpretation of this system of laws.*

The result we get from these considerations is this: That Congress knew that this company would "require," to here quote the words of this court, "*all* its available means in constructing its road," and meant that the company should have and be empowered to use *every* such available means. One such means was the mortgage of these lands to secure bonds, whose proceeds should go to this road's construction. As the court says, Congress did not design to compel "sales" outright of these lands, when yet in an unpenetrated wilderness or desert, and *before* their enhancement in value by reason of the completion of the road. But it is impossible to doubt that Congress meant to suffer their mortgage for the purpose

of "aiding in the completion of the road;" because, as the court says, "*every* possible resource for such completion was required for that end." And, besides all this, remember that such mortgages of such grants were at the date of these acts *universally* resorted to in aid of such constructions. (1 Wall., 391.) Such mortgages, in kind, are expressly provided for in these very acts, and this act received from the Executive of the United States, and their representatives in the board of directors, this practical construction, within two years after this work began, holding that the acts of Congress gave the power to make the bonds and mortgages which are set out in our answer. That practical construction has been sustained and acquiesced in by the executive branch of this government, and under it over ten millions of these mortgage bonds have been put upon the markets of the world, and seven millions thereof are yet owing to the *bona-fide* holders thereof.

How strong, emphatic, and binding, as in favor of the purchasers of these land grant mortgage bonds, this contemporaneous practical construction of this third and other sections of this act has been, will be realized, when it is borne in mind that the bonds were made and sold under the eyes of this government and of all its people; that their validity was directly affirmed by the government directors, and that affirmance reported annually by such directors to the Executive and the Congress, and by them never disapproved; that whenever in the courts either receivers or others have been called upon to account touching payments of interest on bonds of other roads of the *same kind with ours*, the courts have approved them; that this government, and every interested citizen, either under the visitorial powers of such government, or under their interest in the property and operating of our road, has had the power to arrest and defeat the issuance of these bonds, and the payment of interest thereon, if they are *ultra vires* or unlawful. (See Hall *v.* U. P. R. R. Co., 1

Otto, 354–356.) And yet no finger has been lifted, nor whisper been uttered, forbidding the issue or warning purchasers against their purchase!

Not only has not the government arrested the issue, but, in legal effect, it has approved the issue, in the form, for the time, and on the terms embraced in such mortgage. When this court recently, in The United States *v.* Moore, 5 Otto, 763, said that "the construction given to a statute by those charged with the duty of executing it, is always entitled to the most respectful consideration, and ought not to be overlooked without the most cogent reasons," it stated a most salutary rule of interpretation—one of especial application where a change of interpretation would disturb property rights. But in a case like this, where a change of the interpretation would result in a virtual repudiation of perhaps some seven millions of dollars in magnitude, and in an act of national repudiation, the change of interpretation becomes simply intolerable. (See Gelpeke *v.* Dubuque, 1 Wall., 206.) So intolerable, indeed, that the courts steadily hold that bonds negotiated on the faith of decisions by the courts, or of an established and generally-accepted practical construction of the laws which renders such bonds valid, then such bonds cannot be invalidated in the hands of such purchasers by a subsequent reversal of the decisions or established law, on the faith of which the bonds were sold. This court, in Olcott *v.* Supervisors, 16 Wall., 690, says: "If a contract when made was valid, under the Constitution and laws of a State as they had been previously expounded by its judicial tribunals, and *as they were understood at the time*, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing their invalidity." (Havemeyer *v.* Iowa City, 3 Wall., 294; Ohio Life and Trust Company *v.* Debott, 16 Howard, 432; Gelpeke *v.* Dubuque, 1 Wall., 175, and cases there cited.)

What we are here asserting, and what we claim from

the cases just cited under the present head, is *not* that these land grant mortgage bonds have, by the Supreme Court of the United States, or other courts, been *directly* adjudged to be a mortgage of an unconditional fee in these lands, and hence brought literally within the rule just stated. But what we *do* claim is, that the executive, legislative, and judicial authorities of the United States have been so brought to act in and about the issuance of these land grant bonds by all the railroad companies receiving land grants under the act of 1862, and those amendatory thereof, as to have *recognized* and *sanctioned* as valid such issues and sales; that not only these government directors in our board, the departments, and the Congress to whom reports of these issues were made under law, the courts which have dealt with these issues as valid according to their purport, but also the financial, commercial, and entire aggregate business mind and judgment of the country, (see 1 Wall., 391, &c.,) have dealt with, accepted, and acted on these as valid first-mortgage bonds, secured by a mortgage pledging the absolute fee in these lands; and this being so, such bonds are brought within all the legal, political, and moral *reasons* for protection indicated by this court, when it says (16 Wall., 690):

"This court has always ruled, that if a contract when made was valid under the Constitution and laws of a State as they had been previously expounded by its judicial tribunals, *and as they were understood at the time, no* subsequent action of the legislature or the judiciary will be regarded by this court as establishing its invalidity. Such a rule is based upon the highest principles of justice. Parties have a right to contract, and they do contract, in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule."

And see the cases cited by the counsel and the court in Gelpeke *v.* Dubuque, 1 Wall., 175, 187–190; 1 Ib., 297, 391.

The present point, in *one* of its phases, may be accurately stated in the often-repeated words of this court. In speaking of the duty of the courts to enforce that *view* of the laws which was taken by the authorities charged with the issue and sale of such bonds, the court says:

"Even if the case had been doubtful, inasmuch as *the city authorities have given this construction to the charter,*" (in the present case to the powers conferred by the laws of 1862 and 1864,) "*and bonds have been issued, and in the hands of bona-fide purchasers for value, we should have felt bound to acquiesce in it.*"

Van Hostrop *v.* Madison City, 1 Wall., 297.

And in Myer *v.* Muscatine, 1 Wall., 391, the court repeats this, in these words:

"If the subject admitted of a doubt, *we should hold, the city having acted on its own construction, and drawn in others to take the securities and advance their money upon it, it is now concluded from denying that construction to be the true one.*"

What we have now said in regard to the power of this defendant to issue land-grant mortgage bonds, as stated in the answer, has been stated as establishing defendant's power to issue and sell bonds secured by *whatever* title defendant does hold in said lands; and the *main* purpose has not, so far, been to show the extent of that title by the defendant, although part of what we have said establishes defendant's power to mortgage an unconditional fee.

In view of what has been said, we think it utterly incontrovertible that the system of railroad legislation contemplated and authorized the putting upon the money markets of the world negotiable bonds, which should be secured by a pledge of whatever was the utmost and entire title to such lands, as apparently bestowed by these acts of Congress.

DEFENDANT'S POWER TO MORTGAGE AN UNCONDITIONAL FEE.

This, then, prepares us for our next step, which is to show that any mortgage made in good faith, for the purpose of securing the means for the completion of this road, is to "*dispose of*" the lands within the sense of the third section of the act of 1862; and this, whether the defendant, the mortgagor, has an absolute or only a conditional fee in the lands at the date of the mortgage, and that being such a "disposal," it gives the mortgagees a security not subject to said pre-emptive rights.

Under the head which we have now reached, we state our present proposition in these words:

That if it be granted that a mortgage, before the expiration of three years after the completion of the road, is not such a "disposal" thereof as absolutely, and in *every* event, to cut off and end all contingent pre-emptive rights under said third section, yet, *as between the mortgagees or bondholders and the United States*, the mortgage *is* a grant (subject to the conditions and terms of the mortgage) of an absolute fee, against which mortgage no pre-emptive rights can be set up *until* the mortgage is satisfied—that such a mortgage is, *as in favor of the bondholders, and until their bonds are fully paid, a "disposal" of the lands which cuts off all* pre-emptive rights, as between the bondholders and the United States.

Stated in another form, our proposition is this: That it was perfectly competent for Congress to bestow upon the defendant company such a state of title in, and *power of disposition* of, these lands, as that the company should be enabled to borrow money upon them through the means of negotiable first-mortgage bonds, which should, *as in favor of the purchasers of such bonds and as against the United States*, be secured by a mortgage, pledging an unconditional fee; although, at the same time, as between the defendant and the United States, there might remain

in the United States this contingent pre-emptive right named in said third section, to be asserted in the event of the *full* satisfaction of such mortgage. Our proposition now is, that these acts of Congress *did* confer on the defendant *at least* that degree of title and power; that viewed as A POWER, the grants of the two acts contain a power to borrow money to aid in the construction of this road, and to secure the loan by a mortgage, which should be free from all reservations in favor of the grantor of the *power;* and the power being, in good faith, executed in favor of *bona-fide* purchasers, the mortgage is not subject to said pre-emptions.

In presenting what we wish to say in support of this proposition, we premise some things necessary to avoid misapprehension. One is, that we do not claim that *any* mortgage, however frivolous in amount, or however made to evade a *bona-fide* execution of the purposes of this act and to secure the perpetuated monopoly of these lands which the third section meant to avoid, as stated in Railway Company *v.* Prescott, 16 Wall., 609, will be held (should such question ever be, in a competent manner, presented for adjudication to the courts) to be a "disposal" of the lands within said third section, even as in favor of such simulated mortgagee. It is only a *bona-fide* mortgage, made to aid in completing the road, that will be held to be such a "disposal."

Another preliminary statement is, that it is not *necessary* for the purposes of this defense that we should claim that even a *bona-fide* mortgage, so made within said three years, does absolutely and forever cut off all right in the United States ever to have these lands adjudged open to pre-emption; but, on the contrary, it may be admitted that such pre-emptive rights may, *as between the United States and the defendant*, be capable of being established in the *event of the satisfaction of the mortgage*, and of our attempt to hold the lands in perpetuity after such satis-

faction, and yet the defense in this action, on the ground that the mortgage "disposed" of the lands, be a complete defense.

Statement of Main Proposition.

With these two preliminary popositions kept in mind, we repeat, in still another form, what it is we *do* assert as the effect of said mortgage. It is this: That said defendant being shown as above to have power to mortgage, in "aid" of the road's construction, *whatever property* the statutes *did* give such company in these lands, and said mortgage of 18th April, 1867, being admitted by the pleadings to have been one made before the expiration of said three years, to secure ten millions four hundred thousand dollars of bonds, of which about seven millions remain unpaid, in the hands of *bona-fide* purchasers, buying when all departments of the government recognized them as valid, according to the face of the mortgage, and as mortgaging an unconditional fee, and the proceeds of such sale of bonds being *necessary* to, and obtained and applied in good faith for, the completion of said road, such mortgage is a "disposal" of said lands within the meaning of the last clause of said third section: and, as against such unpaid mortgagees, there remains in the United States no right to open said lands to pre-emption. For the purposes of satisfying such mortgage, the mortgagees are authorized to sell and convey as broad and absolute a title as is expressed on the face of the patent of the United States, to wit, an unconditional fee-simple.

State of the Land Title at Date of Mortgage.

Before, and as preparatory to, considering the direct question whether the mortgage is, in itself, a "disposal" of the lands as in favor of the mortgagee, so as to make the unpaid mortgagee's title free from said pre-emptive condi-

tion, it is proper to look at the state of the *apparent* title in the defendant as conveyed by the acts of Congress.

The words of the grant are (12 Stats., 492): "That there *be, and is hereby, granted* to the said company, for the purpose of aiding in the construction of said railroad and telegraph line," &c. Sections 4 and 7 of said act of 1862, taken in connection with its amendment by the act of 1864, in substance, provide for locating said road, filing in the Interior Department a map of the location, and thereupon for the withdrawal of the lands within twenty-five miles of said line from pre-emption, private entry, and sale; and further, that when the President shall be satisfied, by the certificate of commissioners appointed to examine the road, that any twenty consecutive miles are completed, "*patents shall issue conveying the right and title to said lands* to said company on each side of the road as far as the same is completed to the amount aforesaid." This amount was ten alternate sections per mile on each side of the road.

The pleadings in this case admit that every act was done prior to the 16th of April, 1867, (the date of our said mortgage,) which was required to locate said line and fully designate said land, and that said road was fully made and completed to a point westerly of the lands in suit before said last-named date; (Record, pp. 3, 10;) and that the defendant, prior to the 26th of March, 1875, did all the acts required by law in order to entitle defendant to a patent for said lands in suit, along with the other lands; and that on that day a patent was by the United States duly made and delivered according to law, granting to the defendant the legal title to said land. (Record, p. 3.)

These facts, under said provision of law, declaring, in the present tense, that "there *be* and hereby *is* granted," bring this grant exactly and literally within the decisions of this court in such cases as Schullenberg *v.* Harriman,

21 Wall., 44; Railroad Company *v.* Smith, 9 Wall., 95; and Leavenworth Railroad Company *v.* United States, 2 Otto, 741, where the courts hold, that such a grant (that of 21 Wall., 44, being the identical words in which our grant is made) "passed the title to the sections to be afterward located. When the route was fixed their location became certain, and the title which was previously imperfect acquired precision and became attached to the land." (21 Wall., 62.)

In this last cited case, the court, (21 Wall., 62,) after citing the authorities, concludes with these words:

"Numerous other decisions might be cited for the same purport. They establish, that unless there are other clauses in a statute restraining the operating words of the present grant, these must be taken in their natural sense to import immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts."

Now, the reference, *in the present connection*, to these cases, showing that the acts of Congress, by their own vigor, vested in us the title in the lands in suit at the time of their passage, and that this title became complete and fixed to definite lands when our road was located and the lands surveyed, is not to show that said title was unconditional and free from said pre-emptive rights. These cases, such as Schullenberg *v.* Harriman, have an important bearing upon *that* point also; but they are referred to *here* as simply showing that on the 16th of April, 1867, we already had all the title to these lands which we *ever* had, whether that was an absolute or qualified fee. In other words, we want to impress upon the argument, with the most distinct emphasis, that Congress *took care* to put into our hands *a present title*, which could be used to pay for work on this road as such work progressed. It took the most scrupulous care to make our lands *available* to pay for the road *as fast as the lands were earned* by com-

pleting the successive steps of twenty miles each in the progress of the road. In short, the acts, with the most careful solicitude, put all the title which the government ever gave us, whatever that title was, so into our hands as that it COULD BE "DISPOSED OF" as fast as these lands were earned.

In another connection we shall have important use for the proposition now made out, that our title, under the acts of Congress and the patent, was a present and full fee.

And this brings us to the question direct,—Did this mortgage "*dispose*" of the lands within that sense of said third section which defeats the said pre-emptive rights?

Thus far we have shown two things bearing on this last inquiry: One, that the power to mortgage all the company's property, whatever that was, was carefully given to this company. The other, that when we made this mortgage, on 16th April, 1867, we had as full, absolute, and perfect a title to the lands in suit as we ever could have in any possible event, or even after patent; and that there is evinced on the face of the statute a solicitude that we should have such "disposable" title as fast as we earned the lands by road-making.

Now, did Congress mean, by so bestowing said disposable titles, to make a *bona-fide disposal* of them, by mortgage, to raise money to go on with the completion, the equipment, and the operating of this road, a "disposing" of them within the meaning of the said third section? It seems to us, in view of what has been gone over, that it is impossible to deny that Congress did so intend. But owing to the magnitude of this case, and the liability of counsel to be deceived about their cases, we are not justified in omitting to direct attention to any consideration which may strengthen our view of this inquiry. We therefore proceed to state fully why we think but one

answer can be given to the question,—Is this mortgage a "disposal" of the lands?

SOME OBJECTIONS TO DEFENDANT'S POSITION CONSIDERED.

At the time of the preparation of this argument, we have not been put into possession of the brief of the Attorney General, and have not the means of knowing what will be the grounds on which will be rested the support of this action. Under these circumstances, we will be pardoned for assuming that the positions taken by the Executive in this same matter are likely to be those urged here. One position so taken by the Executive is this: That since the fifth section of the act of 1862 made the subsidy bonds accepted by the several companies a mortgage on the property of the company so accepting, therefore, if a mortgage be a "disposal" of the lands within the meaning of said third section, then the *same* act which provided for the pre-emptive rights also provided that there should be no such pre-emptive rights in the lands granted to any company so accepting said subsidy. This is supposed to be a reduction to the absurd of our position.

To this supposed reduction to the absurd, there are several plain answers, each equally conclusive.

One is this: That the case, *even as put*, involves nothing of the absurd; but, on the contrary, the absurdity is on the other side. As put, the case supposes that the "*ipso facto*" mortgage provided for in said fifth section of the act of 1862, *covers all the land grants as a first mortgage*. Now, reading the act (fifth section) shows that this "*ipso facto*" or statutory mortgage does not in express words name the "lands" as covered by that mortgage at all; and applying to the enumeration of things covered by such mortgage the canon of interpretation known by the phrase "*ejusdem generis*," (see cases cited, Sedgwick on Stats., 360, note,) the lands would not be covered by

this mortgage; because when the statutes said the property of "every kind and description" shall be subject to such statutory mortgage, it couples the words "and property of every kind and description" with a catalogue of expressly *named* things so covered, to wit, "line of the road and telegraph," "rolling stock," and "fixtures." These are all of a different kind from lands not a part of the road, and hence the words "property of every kind and description" may well mean of every similar kind with those enumerated, to wit, everything composing a part of the road and its appointments.

But assume that our lands are covered by this statutory mortgage, (one created, *not by the company*, but by the congressional grant,) then what follows? The acts of 1862 and 1864 must be read together as *one system*, and as being in *pari materia*. (1 Otto, 350.) And the act of 1864, section 10, (13 Stats., 360,) makes the bonds issued by *every* company aided by said acts a prior mortgage to that of the United States as created by said fifth section of the act of 1862. The "subordination" of the United States mortgage to those made by the companies is undeniably *as broad as the entire mortgage held by the government*. In other words, if the United States mortgage does cover our land grant, then we are *expressly* authorized not only to make a mortgage on all our lands, but are authorized to make such mortgage a *first* mortgage. That is, it is an express agreement that the United States will not, either as *mortgagee or otherwise*, interfere with or dispose of these lands until the debt is *fully satisfied*, which holds for its *full* satisfaction a security which the act of Congress declares shall be a "FIRST MORTGAGE" as against the United States. To say that the United States need not apply these lands, so covered by her "second" mortgage, to the payment of defendant's debt, but may give them away to pre-emptors, would be to violate the very first law applicable to such securities, and is wholly

untenable. But to say that, as against the creditors whom the government has invited to purchase these as "*first mortgage bonds*" on all these lands, the government may, as against the bondholders, *give* these lands away to pre-emptors, and do this not because of any laches in such *bona-fide* purchasers of the bonds in failing to sell the lands for three years, but on account of the failure of the defendant company to do so, is supremely absurd. It is not merely absurd, but also flatly discarded by the repeated decisions of this court.

When the United States became party, as a junior mortgagee, to the ownership of these liens, they divested themselves, as to this subject-matter, of their sovereignty, and assumed to go, *as a suitor*, into the courts, and to abide by *all* the legal consequences of being *only* a junior mortgagee, and obliged, as such, to account to the defendant for the full value of her junior security, *and to the first mortgage bondholders for the* full value of their first mortgage, to wit, for what the absolute fee in the lands would realize on foreclosure. This doctrine has never been better stated than by Justice Field, in a late decision in the Circuit Court of the United States for California, in United States *v.* Flint. He says:

"The United States, by virtue of their sovereign character, may claim exemption from legal proceedings; but when they enter the courts of the country as a litigant, they waive this exemption, and stand on the same footing with private individuals. Unless otherwise provided by statute, the same rules as to the admissibility of evidence are then applied to them; the same strictness as to motions and appeals is enforced; they must move for a new trial or take an appeal within the same time and in like manner, and they are equally bound to act upon evidence within their reach. *And when they go into a court of equity, they must equally present a case, by allegation and proof, entitling them to equitable relief.*"

In *Elliott* v. *Van Voorst*, 3 Wall. C. C. R., 299, the

court held in the following words, Greer, J., delivering the opinion: "In the mere exercise of a corporate right, the government of the United States cannot claim the prerogatives or immunities of a sovereign. She cannot compel a mortgagor to the hopeless remedy of a petition to Congress to redeem. * * * When the government, in the exercise of the rights and functions of a civil corporation, purchases land to secure a debt, the accident of its sovereignty in other functions *cannot be set up to destroy or affect the rights* of persons claiming a title or lien on the same lands. Thus, when the government of the United States became a partner in a trading corporation, such as the United States Bank, it divested itself, so far as concerned the transactions of that company, of its sovereign character, and took that of the citizen, and consequently its property and interests were subject to the decrees and judgments of courts equally with that of its co-partners." (And see 6 Otto, 36; 3 Wheat., 181; 15 Pet., 232; 11 How., 231.)

In view of these undeniable rules of law applicable to the United States as the *author* and bestower of our FIRST MORTGAGE on these lands, and as the owner of a second mortgage thereon, the United States have stripped themselves of the power to make these bonds, so in the hands of *bona-fide* purchasers, something less than their act of Congress made them, namely, a FIRST MORTGAGE, "paramount" to every reserved right of the United States, whether as junior mortgagee, or as the bestower of pre-emptions, or aught else. When the government authorized us to sell "first mortgage bonds" to the world, as being "paramount" to the reserved interest of the United States, and when the purchasers purchased under *that* assurance, they rendered it impossible for such government, even if it would, to repudiate that "paramount" security, by giving these lands to pre-emptors,

and giving the one dollar and a quarter they shall bring, not to the mortgagee, but to the defendant!

This view alone is fatal to appellant's case if, indeed, these lands are under the mortgage to the United States.

But another conclusive reply to this "*reductio ad absurdum*" point is this, that it simply mistakes the statute. The last clause of the third section of the act of 1862 provides, not that the lands shall be subject to preemption if the lands are not "sold or disposed of" *by the United States* within three years, but that they shall be so "sold or disposed of *by said company.*" This "*ipso facto*" mortgage of the fifth section is, in no just sense, a mortgage "by said company." It is a statutory lien, created by mere act and operation of law, running with and qualifying the grant itself.

So that this, the supreme point on which the Executive has based the decision, and which has brought this case into this court, has in it two remarkable qualities: one a *felo de se*, and the other a misreading of the express letter of the statute.

Another position heretofore taken in resistance of our proposition that said mortgage was a "disposal" of the lands within the sense of said third section, is that such mortgage by us is *but* a mortgage, and being no more than a mortgage, it is not a conveyance of the fee; but is, by the decisions of the States and Territories where these mortgaged lands lie, only a lien, and is therefore not either a sale or a disposal of the lands. And many cases were cited in that decision of the land office which has brought the present case to this court, to show that the laws of the States control, in the Federal courts, the questions of such titles.

Of course this point, that the instrument of the 16th of April, 1867, securing $10,400,000 of moneys loaned to this company and used in making this road, is a mortgage, and only affects the title to these lands as creating

a lien on them for the full security of the said loan, and does not so pass the *legal title* as that such title becomes absolute in case of a default in payment, is one totally without significance as sustaining the position that such mortgage is not a "disposal" of the lands within the said third section. This we shall show in another connection, when we come still more directly to deal with the question,—What is a disposal of the said lands satisfying such third section? We only allude to this point here, that we may say of it that it wholly misses the case. The question here is not what are the laws of the States where these lands are, in regard to whether mortgages are there still common-law mortgages; but the question *is*,—What is the meaning, in *an act of Congress*, of the words "sold or disposed of," as used in a section directing such disposal *of lands of the United States not held by any State title* in aid of a great national work?

This is the point here; and *this* is a "*Federal question*," and not one of local or State law; and of this question this court is carefully made the supreme and final arbiter.

Another position taken in said Executive decision, is one in which it is expressly admitted that the words "disposed of" in such third section are "undoubtedly more comprehensive" than the word "sell," and may be properly used, not only to convey the idea of a sale of lands, but also some other or different disposition of the same; but in which it is asserted that it has no other or different meaning in this clause; and that in this clause "disposed of" is simply interpretative of "sold."

This position will also be necessarily considered when we consider the direct question as to whether said mortgage is subject to the alleged pre-emptive rights. We only allude to this point here for the purpose of directing attention to two remarkable features of this conclusion.

One is, that it seizes on the fact that, in the opinion of the judge in deciding Railway Company *v.* Prescott, 16 Wall., 509, such opinion (in an allusion to the provision in the last clause of said third section) uses the word "sold" alone, instead of using both statutory words, "sold or disposed of"; and the land office makes this merest allusion a judgment of this court, that the words "disposed of" are interpretative of the word "sold," and mean the same thing; and hence that the true sense of the clause is, "all such lands which shall not be sold, or sold," &c. What is remarkable in this, is that, confessedly and palpably, the question whether "disposed of" here meant the same thing as "sold," was neither before the court, considered by the court, nor in the mind of the judge; and yet this mere allusion to a clause of the statute, without any pretense of even quoting it, much less construing it, is foundation enough on which to base one of the most important decisions ever made in the land office.

The other remarkable thing about this conclusion, drawn from the reasoning of this court in Railroad *v.* Prescott, is this: That the said part of this opinion, so distorted, is devoted to showing that this last cause of said third section reserves such an interest in such lands to the government as defeats the right of the States to tax said lands. But this *entire part* of the Prescott case, opinion and all, had, at the date of this land office decision, been expressly overruled by this court in McShane's case, 22 Wall., 444, the opinion being by the same justice as in the Prescott case.

Reasons why the Mortgage of the 16th of April is a "Disposal" of said Lands.

We now state some considerations in support of the direct proposition which makes one of the defenses in this case.

That proposition is, that the mortgage disclosed in the answer is, under all the conditions and terms which attach to it, both a "sale" and "disposal of" these lands, which defeats all rights of pre-emption as long as the mortgage is unsatisfied by payment of the debt it secures.

First. The contention now made by the Executive of the United States in the attempt to deprive the *bona-fide* purchasers of the land-grant mortgage bonds, by bestowing the lands covered by this mortgage upon pre-emptors, involves, under the conditions in which it is made, a gross wrong and hardship, (even if it did not involve, as it does, a violation of strict legal rights,) and is, therefore, even in this view, a claim against which the courts *lean* in the endeavor to avoid what is, in effect, an act of national repudiation.

We have above shown, that to now assert this alleged forfeiture, would be very like an act of national repudiation. We claim to have shown this by facts like the following: The face of said acts, and patents thereunder, purporting, as they do, to grant the non-forfeitable fee; the necessities for the raising of this money to "aid in the construction" of this road; its honest contribution for, and its application to, that purpose; the palpable *impossibility* of raising such money on mortgages that did *not* grant the right to sell the unconditional fee, should that be necessary to the payment of the loan, and which gave no more security than a lien *on a title, which would be forfeited to the United States if the lands were not absolutely sold before they received the appreciation expected from the developments of the country as the result of the road's completion;* the impossibility of raising such loans, except on the then universally-adopted form of long bonds, which would *not mature until many years after this alleged forfeiture to the United States would be complete;* the giving of these long bonds under the sanction of the government directors, in our board of directors, and in the form of

first-mortgage bonds, secured by lands conveyed afterwards, by patents apparently granting the full, absolute, and unconditional fee; their sale in the markets of the world *apparently* conveying that degree of title; the explicit and peremptory requirement of the laws, (as in the twentieth section of the act of 1862, 12 Stats., 498, and in sections 1 and 4 of the act of the 25th of June, 1868, 15 Stats., 79,) that that "full and specific information upon" (15 Stats., 79) "the indebtedness of said company, setting forth the various kinds thereof," (12 Stats., 498,) were, under oath, furnished to the Executive, and through it to the Congress of the United States, thus apprising them, and the entire public, that such bonds (so purporting to be secured by a fee-simple, absolute to such lenders of money on *such* securities) were being sold; that the United States and every interested citizen, at all times, have held the power to arrest said issues, (so made apparently by pledging a fee-simple security,) if that were unlawful, and yet neither Congress, the Executive, nor any citizen has hinted an objection to taking the money of such *bona-fide* purchasers on *said* security, but, on the contrary, all these, and the courts also, have ever recognized said mortgage bonds, so purporting to cover the fee, as binding and valid; that these things constitute a solemn and explicit *practical interpretation* of these acts, to the effect that such mortgage cannot be defeated by the alleged forfeiture in favor of pre-emptors. (See 1 Wall., 297, 391.)

And in view of the combined effect of these facts, all disclosed by the present record, or judicially known as public laws, we claim that there is made out both a practical construction of these laws, (see 5 Otto, 763,) making them authority to mortgage the absolute fee, and also the establishment of a unanimous official and general understanding in this country and the markets of the world that such unconditional fee could be mortgaged.

This being so, it results that this universal interpreta-

tion under which such sales of bonds were made becomes part of the contract, and it is repudiation to retreat from it. (Olcott *v.* Supervisors, 16 Wall., 690.)

We submit, that no line of adjudications is exhibited in the history of this court more honoring to the name of our country, or more approved by all the people, than that one which has steadily held every effort at the repudiation of State, municipal, and Federal obligations, like the one here attempted, abortive. This line of adjudications is as remarkable for its length as it is for its steadiness in rebuke of all such immoralities. And so, also, as to the adjudications of the States in the same direction. A very suggestive indication of this will be found in 6 Abbott's Digest, 116, sec. 12.

Second. To this last preceding proposition the reply is made, that the purchasers of said bonds were bound to look to the statutes under which alone said mortgage could be given, and that, so looking, they saw that the last clause of said third section reserved to the United States the alleged right of forfeiture, which could not be cut off by any grant by the defendant, either by mortgage or otherwise; and hence such purchasers are charged with notice of such liability to forfeiture, and hence took such bonds so subject to said condition of forfeiture.

This position is a mere begging of the whole question in controversy. All which we have pointed to above, and repeated in our first proposition just above stated, is directed to show that said mortgage, set out in the answer, was, in law and fact, at least as in favor of the beneficiaries under that mortgage, a "disposal" of said lands; and hence, that there is, as to such purchasers of bonds, no forfeiture that can be asserted to the prejudice of their security. We will below add other considerations further establishing this position.

Third. That said mortgage is a "disposal" of said lands within the meaning of said third section, is conclu-

sively established by the known judicial signification of the words "disposed of."

When these words "disposed of" were employed in the act of Congress of 1862, said words, *and as applied to the public lands*, had already received from this court their binding judicial signification. And when such legal terms are employed in an act, their accepted legal sense as words of the law is the sense in which the courts must assume Congress employed them, unless they are deprived of that sense by the other provisions of the act.

1 Kent's Comm., 462.
United States *v.* Jones, 3 Wash. C. C., 209.
Bank *v.* Cook, 4 Pick., 405.
McCool *v.* Smith, 1 Black, 469.
Sedgwick on Stats., 221–224, 225, and notes.

That the words "disposed of" had, at the date of the act of 1862, received an interpretation which makes them cover (to here adopt the words of the Attorney General, 4 Opins., 487) "*every* mode by which the lands and other property of the United States could be parted with by the government, whether sale, gift, or any *limited* interest," is incapable of successful dispute.

In section 3 of article 4 of the Constitution we find this:

"Congress shall have power to *dispose of* and make all needful rules and regulations respecting the territory and other property of the United States."

Here we find that the phrase is not a new one, but is at least as old in law as our present government.

And the Supreme Court has declared what it means.

In The United States *v.* Gratiot *et al.*, 14 Pet., 526, it was argued that the words "*dispose of*," in this clause of the Constitution, only gave the power to *sell*, and, therefore, that Congress could not lease, or authorize the President to lease, the public lands. But the Supreme Court,

in that case, held the contrary. After commenting upon the powers of Congress, the court says:

"If such are the powers of Congress over the lands belonging to the United States, the words 'DISPOSE OF' *cannot receive the construction contended for at the bar: that they vest in Congress the power only to sell, and not to lease such lands.*"

And the lease in that case was sustained.

Here, then, it is decided that the words "dispose of" give the power to lease, and hence they are not the equivalent of the word "sale"; and, necessarily, "dispose of" is not the equivalent of "sold."

The same doctrine was held in United States *v.* Gratiot, 1 McLean, 454.)

In 4 Opinions of Attorneys-General, 487, this language of the Constitution was again interpreted, as follows:

"The third section of the fourth article of the Constitution declares that Congress shall have power to *dispose* of and make all needful rules and regulations respecting the territory or other property of the United States. The term employed was adopted from the ordinance of 1785, and comprehends every mode by which the lands and other property of the United States could be parted with by the government, whether by sale, gift, or for any limited interest. * * * A lease is a disposition by grant of a limited interest in the lands."

And speaking of a lease, the Attorney-General says it "*disposes* of the lands demised," and he italicizes the word as above.

In the case of Scott *v.* Sandford, 19 How., 393, referring to this clause of the Constitution, the court says:

"It begins its enumeration of powers by that of *disposing;* in other words, making sale of the lands, *or raising money from them.*"

See, also, 1 Opns. Attorneys-General, 352, 593.
2 " " " 708.
3 " " " 93.

In the light of these authorities, it is impossible to say that the words "dispose of" do not convey authority to *lease*, just as much so as if the word *lease* had been written in the Constitution in their stead. And so in this statute these words give the authority to lease, just the same as though the phrase had been "sold or *leased*," instead of "sold or disposed of." And if Congress had seen fit to use the phrase "sold or leased," you could, with just as much propriety, ignore the presence of the word "leased," or construe it out of the statute, as you can the words "disposed of."

To say, therefore, that the added words after "sold" in this third section, which are not "*and* disposed of," but "*or* disposed of," leave the sense the *same* as if they had not been added, is not construction of, but violence to, the statute. It is to simply cut out of the statute part of its most essential and operative words; and this without either excuse, or the pretense of excuse. But to change the sense of these added words, "or disposed of," so as that they shall mean the *same* as the word "sold," is not only to do violence to the ordinary lexical signification of the words, but is still more,—to torture them out of their adjudged legal and technical sense into a narrower and false signification, to which they have never been *confined*, either in their popular or their law signification.

To do this, is simply a judicial impossibility; and hence when these lands were so mortgaged to raise this enormous sum of money, so put into the construction of this road, precisely as is expressly directed by said act of Congress, then, *as in favor of the mortgagees*, these lands were "*disposed of*," to every legal intent and purpose, as contemplated by said third section.

Fourth. But really—in legal principle and almost in exact letter—the case at bar is already decided by the unanimous judgment of this court in Tucker *v.* Ferguson, 22 Wall., 527. That case was in substance thus:

1st. Congress granted to the State of Michigan, "to aid in the construction of certain railroads," certain lands, to be held by the State *for the use and purpose aforesaid*, to be "disposed of only as the work progresses, and applied to no other purpose whatever."

2d. When twenty continuous miles of road were completed, a certain quantity of lands might be *sold*, and if the road was not completed in ten years, any lands remaining "unsold" should revert to the United States.

3d. The Flint and Père Marquette Railroad Company having been organized, the State, by an act of the Legislature, vested in that company the lands, "according to the provisions of the act of Congress relating thereto," &c.

4th. By this act of the Legislature the company was authorized, when twenty continuous miles of road were completed, to *sell* sixty sections of the land.

5th. This company finding itself unable to *sell* the land, because it was in a wilderness, in advance of the completion of the road, *mortgaged* it to Tucker and others, as trustees, to secure certain bonds, with power of sale, and thereby procured money with which to construct the road.

6th. The lands having been mortgaged, as above, to Tucker and others, as trustees, a tax was levied upon them.

7th. Tucker *et al.* filed a bill to enjoin the collection of these taxes.

Now, let it be particularly noted that the act of Congress granting the lands to the State of Michigan only provided that the lands might, in a certain contingency, be *sold*, and the act of the Michigan Legislature, granting the lands to the company, only made a like provision. There was no provision for *mortgaging* or otherwise disposing of them, except as indicated by the word "sold."

It should be stated, and borne in mind, that, by the laws

of Michigan, a mortgage is declared to be a lien only. (See Michigan Decision, 17 Mich., 351, 363; 12 Mich., 270, 278.)

This court, notwithstanding the law of Michigan, that *a mortgage shall only be a lien*, in deciding the case, says (pp. 572, 573):

"When the mortgages were executed the complainants took the legal title, so far as the company held by that title, and the equitable or inchoate title of the company to the residue of the land. * * *

"If they (the mortgages) contain a covenant of warranty, the legal title, as fast as it was acquired by the company, inured to the mortgagees. If there was no warranty, and the *land*, and not the *title* of the company, was conveyed, the company is barred by estoppel from setting up the after-acquired title, and the estoppel runs with the land. The result is the same as if there had been a warranty."

This is a distinct and emphatic declaration that this *mortgage* conveyed the title to these trustees, although the statute only authorized the lands to be "sold."

Here an act of Congress grants to a State lands to aid in the construction of railroads, and such act *restricted* the State from disposing of them in any other way than by *sale*, as the road progressed (11 Stats., 22); and the State accepted the lands, "*with the restrictions and upon the terms and conditions contained in the said act of Congress*," and the same act of the legislature vested them in a railroad company "*fully and completely, according to the act of Congress relating thereto*"; and such company not being able to *sell* the lands, made a mortgage thereof, in substance identical with the one set out in the answer. And the question presented to this court, and which this court was compelled to decide, was,—Whether such mortgage was a "sale" of the lands, within the sense of the act of Congress, which required them to be sold and dis-

pose df in no other way, (11 Stats., 22,) and in such sense as that the United States had, in virtue of a lawful sale, ceased to have any interest therein, either under the right of reversion contained in the fourth section, (11 Stats., 22,) or otherwise? And what the court decided on this state of facts is accurately stated in the syllabus, in these words:

"Held, upon this part of the case, that the lands had been *sold*, within the meaning of the act of Congress, and that though the State, while she held the title as trustee of the United States, could not tax them, she *now* could do so."

Of course, the fact that these lands passed from the United States to the railroad company through a conduit, —the State of Michigan,—does not distinguish the case of Tucker and Ferguson from the one at bar, in any respect here being considered. The State did not attempt, in its grant to the railroad company, to *divest* the United States or the lands of any of the rights, terms, and conditions upon which the State took the land from Congress, but, on the contrary, *expressly* made them subject, "fully and completely, according to the act of Congress relating thereto," to the conditions annexed to them in the congressional grant to the State. But had the State attempted to divest the lands of any conditions which Congress annexed to their title, such attempt would, of course, have been wholly without any legal effect. (See Schullenberg *v.* Harriman, 21 Wall., 59.)

If this mortgage, in the case of Tucker and Ferguson, was a "*sale*" of these lands, within the fourth section of this act of 3d June, 1856, (11 Stats., 22,) then we inquire, —What degree of ingenuity in the way of contrivance, or boldness in the way of torture, will be required from the Attorney General to show that our mortgage of the same identical kind is neither a "sale" nor a "disposal of"

these lands, within the meaning of the third section of the act of 1862?

Fifth.—But, again, this mortgage being made in consideration of ten millions of dollars advanced to this company for the very object for which the act of Congress granted the land,—to wit, to "aid in the construction of the road,"—and the company having granted, bargained, sold, released, enfeoffed, conveyed, and confirmed" the legal title, in consideration of that loan, it brings the transaction within the precise *purposes* for which Congress made the grant and directed a sale or disposal thereof to be made, and therefore such a mortgage is, as between the United States and the mortgagees, both a *sale* and *disposal of* said lands, as designed by Congress.

That such a mortgage, as between the mortgagor and the mortgagee, conveys the legal title, and in that sense is a sale on condition, this court has often held, and as was held in Tucker and Ferguson. In Brobst *v.* Brock, 10 Wall., 529, this court says:

"It is true that a mortgage is, in substance, but a security for a debt, or an obligation to which it is collateral. As between the mortgagor and all others than the mortgagee, it is a lien, a security, and not an estate; but as between the parties to the instrument, or their privies, it is a *grant which operates to transmit the legal title to the mortgagee*, and leaves the mortgagor only a right to redeem."

In the case of Conrad *v.* The Atlantic Insurance Co., 1 Pet., 441, Mr. Justice Story, delivering the opinion, uses this language:

"It is true, that, in discussions in courts of equity, a mortgage is sometimes called a lien for a debt; and so it certainly is, *and something more:* it is a *transfer of the property itself*, as security for the debt. This must be admitted to be true at law; and it is equally true in equity;

for in this respect equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a *trust estate*, &c. It is, therefore, only in a *loose and general sense that it is sometimes called a lien*," &c.

Now, if it is "*a transfer of the property itself*," that is certainly a *disposal of it.*

In the case of Van Ness *v.* Hyatt, 13 Pet., 297, the question was whether an execution against the mortgagor could be levied upon the mortgaged property. The court says:

"Shields had mortgaged the lot to Franks, and consequently his right was only an *equity of redemption.* Was this such a right or interest as that a *fieri facias* could be levied upon it? The principle of the common law undoubtedly is, that no property but that in which the debtor has a *legal title* is liable to be taken by this execution; and, accordingly, it is well settled in the English courts that an equitable interest is not liable to execution."

To the same effect, see also Lessee of Smith *v.* Butts, 24 How., 399; and Morsell *v.* First National Bank, 1 Otto, 358.

These cases are not here cited to show that the common-law rule in regard to the transfer of title by mortgages is or is not here applicable; but are only cited to illustrate and enforce, what is declared in Tucker and Ferguson, that the title was *so* affected and "disposed of" by the instrument as to make the transaction a sale (and certainly a disposal of) the land upon and for a valuable consideration, precisely as contemplated by the third section of the act of 1862.

Sixth. How completely this mortgage "disposed of" all the interest of the United States in these lands, is indicated by the case of Railway Co. *v.* McShane, 22 Wall., 444. There, this court held that even so slight an interest held by the United States as the right to have the costs of

survey paid, was, before patent issued, enough to prevent the State from taxing the lands before patent issued, but was not enough if the patent had issued. But the court held that this alleged right to assert a forfeiture under this last clause of the third section of the act of 1862 was, "IF IT EXISTED" at all, (22 Wall., 461,) too "undefined and uncertain" to prevent the State from taxing the land before or after patent issued.

The result, then, for the present point of this case, is this, to wit: That this pre-emptive right of forfeiture is so "undefined, uncertain," and intangible as to be *less* than the right to have the defendant pay for the surveys of its lands,—is so impalpable as not to keep off the taxation by the States. Is it possible that a mortgage by the defendant, made upon a full consideration, of enormous magnitude, and which mortgage accomplished the very purpose for which the acts of Congress directed that the lands should be "disposed of," and which mortgage, together with the grant by Congress, left in the government an interest so undefined and uncertain as this pre-emptive right is here declared to be, "if it exists," is still so large a reservation as to prevent such mortgage from being a disposal of the lands?

Tucker and Ferguson is a direct and explicit answer that it is not. And especially and pre-eminently, shall such an undefied, uncertain, and infinitesimal reservation to the United States be held—in the light of such cases as Van Hostrup, 1 Wall., 297, and Muscatine, 1 Wall., 391—of *such* character and magnitude as to induce this court to become party to a repudiation of that construction put upon these acts, (under which this government sanctioned their sale, and under which they were sold as mortgaging a fee unconditional,) and a partner in the destruction of these securities?

No Present Right of Pre-emption, Even if There Exists a Right of Forfeiture.

There is another equally perfect defense to this action by the appellant.

It is this: That even conceding that the government holds, as against these lands, the right to have them declared forfeited and open to pre-emption, yet that right can only be asserted by some step to have the forfeiture declared,—a step in the nature of "office found,"—and which step it is wholly incompetent for the Executive Department of this government to take.

We have above shown that the title to these lands vested in us by the *present* grant contained in the act of 1862, and that it became fixed to our exact and specific lands when our surveys and location of the road were complete. Then our title was in all respects perfect.

It will also be carefully observed, that if there be any forfeiture attached to this title so granted, it is in the nature of a condition subsequent—is one which could *only* occur *after* the title was so vested, and which worked a forfeiture of such vested title.

It will also be kept in mind, that the event or thing which alone could work such forfeiture was a traversable event or fact, capable of proof or disproof; was a mixed question of fact and law; was whether we "sold or disposed" of the land within three years. That traversable fact depended upon many things for its existence or non-existence. One was,—When was our "entire road" "completed"? Another was,—Have we sold or disposed of said lands; and if so, when? Upon the decision of all these questions, the right decision of the matter of forfeiture depends. But these are questions which in no case can the Executive assume to try or decide. But they must be decided before there is any forfeiture or right in

the government to enter upon our lands by granting pre-emptions, or otherwise. Hence this attempt of the Executive to enter upon such lands for pre-emption purposes is mere usurpation. We use the word in its legal, and not in an offensive sense.

Now, what we have just said has been repeatedly decided by this court.

In Fairfax's Lessee *v.* Hunter's Lessee, 7 Cranch, 603, this court held that a perfect, but defeasible title in the devisee of Lord Fairfax, who claimed, under a grant of Charles II, certain waste and unappropriated lands in Virginia, could not be resumed or forfeited, as against such lessee, except upon and after "an inquest of office, perfected by an entry and seizure, where the entry was not vacant."

But the case of Schullenberg *v.* Harriman, 21 Wall., 44, is one exactly in point, and is conclusive of this defense.

There, the question of the ownership of certain logs depended upon the further question whether the lands had reverted to the United States, which were granted to Wisconsin to aid in making certain railroads, with a provision that if the road was not completed by a named date, the lands should revert to the United States. The road was *not* completed by the named day, nor ever; and it was claimed by the plaintiff that the defendant (who claimed in virtue of the title of the State of Wisconsin) could not hold the timber, because Wisconsin had lost all title in the land, and to the logs cut therefrom, by reason of a forfeiture attached, by the act of Congress, to the failure to make the road. Thus the question arose whether the United States could enter upon or exercise ownership over the lands which she had thus conveyed by a *present* and effective transfer of title, but subject to a condition subsequent, whereby they might be forfeited, without "office found.

In deciding the case, the court, after showing that no *individual* can assert any right of entry for such forfeiture to the government, says (p. 63): "In what manner the reserved right of the grantor for the breach of the condition must be asserted, so as to restore the estate, depends upon the character of the grant. If it be a private grant, that right must be asserted by entry, or its equivalent. If the grant be a public one, it must be asserted by a judicial proceeding authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging the restoration of the estate on that ground; or there must be some *legislative* assertion of ownership of the property for breach of the condition, such as an act directing possession and appropriation of the property, or that it be offered for sale or settlement." * * * "In the present case, no action has been taken, either by legislation or judicial proceedings, to enforce a forfeiture of the estate granted by the acts of 1856 and 1864." (11 Stats., 20, and 13 Stats., 66.) "*The title remains, therefore, in the State as completely as it existed on the day when the title, by location of the route of the railroad, acquired precision and became attached to the adjoining alternate sections.*"

The same doctrine is stated in the above cited case of Tucker and Ferguson, holding that the government could only enforce the alleged forfeiture "by office found, or other proper proceeding to assert their rights" in such granted lands. (22 Wall., 571.)

The title to our lands involved in this suit remains in the mortgagees as fully as it ever was, even if there be a right of forfeiture; and this alone ends the appellant's case.

What is said in the case of Prescott and Railroad Company, in regard to this entire matter of the reserved rights of the United States as in favor of pre-emptors, including what is said about no further legislation being requisite

in order to establish this forfeiture, is not only declared in the McShane case (22 Wall., 461) to "*not be necessary to the judgment* of the court, as it rested as well upon the failure to pay the costs of surveying the land," but the court expressly declares, as to all that part of the decision, that "*we are now of opinion, on a fuller argument and more mature consideration, that the position is not tenable.*" And the court then proceeds to *at least* doubt whether the pre-emptive right "exists" at all. But more than this: The court is careful to say that "we do not now propose to decide whether any legislation or other action is necessary" to authorize pre-emptions. It is impossible, therefore, to maintain that there is left even any of the *obiter* which is found in the Prescott case to stand in the way of the full, clear, and explicit decision in the case of Schullenberg,—that lands situate like these cannot be taken possession of by the government on this ground of forfeiture, except after some act of the Legislature or the courts declaring the forfeiture.

SHELLABARGER & WILSON,
Of Counsel for the U. P. R. R. Co

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 885.

WM. H. PLATT, PLAINTIFF AND APPELLANT,

vs.

THE UNION PACIFIC RAILROAD CO. AND FRED. L. AMES, APPELLEES.

BRIEF OF JOHN P. USHER AND HENRY BEARD, ATTORNEYS FOR THE KANSAS PACIFIC R. W. & T. CO.,

(Filed by Permission of the Court)

ON BEHALF OF THE APPELLEES.

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It is not intended in this brief to cover the points made in the briefs of Mr. Bartlett and Messrs. Shellabarger & Wilon, of counsel for the appellees.

STATEMENT OF THE CASE.

[This statement is restricted to the facts upon which the subjoined argument is based, omitting other important facts.]

The land in controversy is the south half of the northwest quarter, and west half of the northeast quarter of section fifteen, (15,) in township eleven (11) north, range nine (9) west of the sixth principal meridian, Nebraska. (Record, printed p. 2.)

On the 25th March, 1875, a patent from the United States for said tracts was executed and delivered to the Union

Pacific Railroad Company, said tracts being of the description granted by Congress to said company by the acts of Congress relating to the Union Pacific Railroad Company, it being conceded that said company had fully complied with said laws prior to the delivery of said patent. (Record, p. 3.)

Prior to July 15, 1869, the tracts in controversy had been duly withdrawn from pre-emption, private entry, and sale, and set off to said company for the purposes described in said acts.

The legal title to said tracts (subject to the conveyance in the nature of a mortgage by said company to said Ames, made April 16th, 1867,) was, on the commencement of the suit, in the said railroad company. (Record, p. 3.)

The plaintiff, on the 6th September, 1878, presented to the Register and Receiver of the United States Land Office at Grand Island, Nebraska, a declaratory statement, giving notice of his claim of a pre-emption right under section 2259 Revised Statutes, in said lands, which those officers refused to accept and file, because a patent had, theretofore, been issued to the said railroad company.

On the 21st September he again presented the notice to the Register of said Land Office, who then accepted and filed the same. (Record, p. 4.)

On the same day the plaintiff made proof before the Register and Receiver of his personal qualifications as a pre-emptor, of his settlement and improvement of the premises, which said officers accepted as satisfactory, and, thereupon, he paid the Receiver for said land, at the rate of one dollar and twenty-five cents per acre. (Record, p. 5.)

The plaintiff being in possession and claiming, by reason of these facts, the *equitable title to said lands*, the defendant company, on the 24th September, 1878, instituted, in the United States circuit court, an action of ejectment against said Platt—and to enjoin the proceedings in ejectment, and maintain his possession of the premises, (Record, p. 6,) the

plaintiff, Platt, filed his bill in equity in which he asked for a perpetual injunction to restrain the company and said Ames and their attorneys, &c., from disturbing or molesting him in his possession. He also prayed that the title held by the defendants, or either of them, be decreed, to be held in trust for him, and that they be compelled to release and surrender the same by proper conveyance, and that he might have other and further relief. (Record, p. 7.)

The defendants did not demur, but answered, saving all exceptions to the insufficiency of the complainants' bill. (Record, p. 8.)

Provisions in the Pacific Railroad Grants relating to the lands granted by said acts, with extracts from other laws also affecting the granted lands.

[Act July 1st, 1862.]

SEC. 3. *And be it further enacted*, That there be, and is hereby, granted to said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of *five* alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. *And all such lands so granted by this section which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding one dollar and twenty-five cents per acre to be paid to said company.*

SEC. 4. *And be it further enacted*, That whenever said company shall have completed forty consecutive miles of any

portion of said railroad or telegraph line ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad—the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality—the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road, as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners. * * * *

SEC. 7. * * * * *Provided*, That within two years after the passage of this act, said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted, to be surveyed and set off as fast as may be necessary for the purposes herein named.

SEC. 17. * * * * *Provided*, that if said roads are not completed, so as to form a continuous line of railroad, ready for use, from the Missouri river to the navigable waters of the Sacramento river in California, by the first day of July, eighteen hundred and seventy-six, the whole of all of said railroads before mentioned, and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling-stock, machine shops, lands, tenements, hereditaments, and property of every kind and character, shall be forfeited to and taken possession of by the United States.

[Act July 2, 1864.]

SEC. 4. *And be it further enacted*, That section three of said act be hereby amended by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten;" and by striking out the word "ten," where the same occurs in said section, and inserting in lieu thereof the word "twenty." And section seven of said act is hereby amended by striking out the word "fifteen," where the same occurs in said section, and inserting in lieu thereof the word "twenty-five." And the term "mineral lands," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp-land, or other lawful claim, nor include any Government reservation or mineral lands, or the improvements of any *bona fide* settler on any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturist, to be ascertained under such rules as have been or may be established by the Commissioner of the General Land Office, in conformity with the provisions of the pre-emption laws: *Provided*, That the quantity thus exempted by the operation of this act, and the act to which this is an amendment, shall not exceed one hundred and sixty acres for each settler who claims as an agriculturist; and such quantity for each settler who claims as a miner, as the said Commissioner may establish by general regulations: *Provided, also*, That the phrase "but where the same shall contain timber, the timber thereon is hereby granted to said company," in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the centre of the line of any one of said roads or branches mentioned in said act or in this act.

SEC. 21. *And be it further enacted*, That before any land granted by this act shall be conveyed to any company or party entitled thereto under this act, there shall first be paid into the Treasury of the United States the cost of surveying, selecting and conveying the same by the said company or party in interest as the titles shall be required by said company, which amount shall, without any further appropriation, stand to the credit of the proper account, to be

used by the Commissioner of the General Land Office, for the prosecution of the survey of the public lands along the line of said roads, and so from year to year, until the whole shall be completed, as provided under the provisions of this act.

[Act July 1, 1864.—13 Stat. p. 335, par. 2238 Rev. Stat.]

Be it enacted, &c., That from and after the passage of this act, in the location of lands by States and corporations, under grants from Congress for railroads and other purposes, (except for agricultural colleges,) the Registers and Receivers of the land offices for the several States and Territories, in the districts where such land may be located, for their services therein, shall be entitled to receive a fee of one dollar for each final location of one hundred and sixty acres, to be paid by the State or corporation making such location; the same to be accounted for in the same manner as fees and commissions on warrants and pre-emption locations, with limitations as to maximums of salary prescribed by existing laws, in accordance with such instructions as shall be given by the Commissioner of the General Land Office.

[Act of March 6, 1868.—15 Statutes at Large, p. 39.]

An act restoring lands to market along the line of the Pacific railroad and branches.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That nothing in the act approved July 1st, eighteen hundred and sixty-two, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and the acts amendatory thereof, shall be held to authorize the withdrawal or exclusion from settlement and entry, under the provisions of the pre-emption or homestead laws, the even-numbered sections along the routes of the several roads therein mentioned which have been or may be hereafter located: *Provided*, That such sections shall be rated at two dollars and fifty cents per acre, and subject only to entry under those laws: and the Secretary of the Interior be, and is hereby, authorized and directed to restore to homestead settlement, pre-emption or entry, according to existing

laws, all the even numbered sections of land belonging to the Government, and now withdrawn from market, on both sides of the Pacific railroad and branches, wherever said road and its branches have been definitely located.

[Act of June 22, 1874.—18 Statutes, 194.]

AN ACT for the relief of settlers on railroad lands.

Be it enacted, &c., That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the Land Office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided*, That nothing herein contained shall in any manner be so construed as to enlarge, or extend any grant to any such railroad, or to extend to lands reserved in any land grant made for railroad purposes: *And provided further*, That this act shall not be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a pre-emption or homestead settler after the location of the line of the road and prior to the notice to the local land office of the withdrawal of such lands from market.

In view of the importance of this case, as one calling for an interpretation of a clause in the act of 1862, never before brought directly in issue in this Court, and as one that may affect a large number of parties in like condition to-day with the plaintiff, we may be pardoned for asking the examination of the statutes above quoted, whilst seek

ing the true interpretation of the following words in section 3d, act July 1st, 1862:

"All such lands so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company."

ARGUMENT.

The bill of complaint seeks to restrain proceedings in ejectment. The legal title of the premises is assumed to be in the defendant railroad company, and one object of the bill is to obtain a conveyance of the legal title. The plaintiff is in possession, and if the legal title were in the United States, ejectment could not be maintained by the company, and the complainant could defend his possession at law.

THE ERROR ALLEGED

by the appellant's attorney, is "that the bill was dismissed on the hearing" by the circuit court.

We contend that there was no error in the decision of the court below—

Because the record does not show such facts as entitle the plaintiff below to the relief sought.

It does not show that the plaintiff, at the time of filing his bill, had an equitable title. He has nothing, and claims nothing, except as a settler on the land to which the railroad company has title, and to which it had title on the 6th day of September, 1878, when he first applied at the district land office to file a declaratory notice of his pre-emption claim alleging settlement upon the lands within the three months next preceding.

The record presents him as a claimant of lands, fully

granted and conveyed by the United States to the said company. The company has held title, excepting the mortgage conveyances, for more than three years next preceding the plaintiff's applications of September, 1878, and it is because it has so held title three years that the plaintiff claims a conveyance of such title as the company now holds, from said company to himself, and this claim is urged, under the clause above quoted, although the record does not show that he ever applied to the company for title, or paid or tendered to it the price of the land.

He has, however, applied to the United States land officers, and has paid to an officer of the United States, called a "Receiver of public moneys," whose name the record does not disclose, and who is a stranger to the railroad company, the amount of one dollar and twenty-five cents per acre as the price of said land.

The requirement of the law is, that the price shall "*be paid to said company*," and the price not to exceed $1.25 per acre. The time and manner of payment is not prescribed. That may be a matter of agreement with the company, so might the price; but payment of money to a stranger gives rise to no obligation upon the company to convey, unless it so agrees; payment to the company must be made or tendered in full, as well as evidence of qualification, &c., before a conveyance can be demanded from it.

We shall try to show that Congress certainly intended that parties demanding the benefit of the clause under discussion, must make pooof and payment to the satisfaction of the company, otherwise he cannot restrain the company from asserting its title at law.

In the Dudymott case, the words under discussion came under construction in the executive offices in the Land Department. The Commissioner of the Land Office held that "*the disposition of lands in the condition of the tracts involved in the application in hand, is not within the jurisdiction or control of this office.*"

This conclusion we deem to be the proper one, but the Secretary of the Interior, in July, 1868, overruled it, and held that such lands "revert to the public domain for sale and disposal for the said company, under the pre-emption laws of the United States."

The company's railroad having been completed more than three years, instructions were accordingly issued to local land offices in August, 1868, to take jurisdiction of the company's lands, and where they had not been finally sold and conveyed by the company, the local land officers were instructed to sell them to pre-emptors, as public lands of the United States, at $1.25 per acre. The plaintiff's case has arisen under those instructions.

We deem them erroneous for two plain reasons—

1*st*. *The Pacific Railroad acts have made a grant of full title, and provided for the issuing and delivery of a patent, and when such patent has been regularly issued and delivered, executive jurisdiction over the land has terminated.*

2*d*. *The legal jurisdiction of registers and receivers in admitting pre-emption rights and selling lands is restricted to the public lands of the United States.*

Before proceeding to the argument, a general observation may be submitted.

The defendants recognize the fact, that the general object of the grant of lands was to aid in building the railroad and telegraph line. To apply the land to the object, mortgages and sales were both requisite. Sales could not be made fast enough—hence the mortgages.

Corporations generally can hold lands only as authorized by their charters, or as incident to powers expressly confered by charter. Banks, insurance companies and religious and benevolent societies, are usually restricted by special provisions of law in holding or dealing in real estate. The interests of the corporations, and the public welfare are sup-

posed to be jeopardized by the accumulation of large landed estates in one hand in perpetuity. It would seem that some such reason as this led to the incorporation of the clause under discussion into the Union Pacific Railroad grant; and this remark is in harmony with the expressions of this Court in Railway Company *vs.* Prescott, 16 Wallace, 609; and Railway Company *vs.* McShane, 22 Wallace, 461.

If there be the analogy to which we refer between this case, and the common cases of banks, insurance companies, &c., then we at once accept the clause under review, as imposing a burden on the company, to accompany its title and ownership until the obligation be discharged by it.

There is no authority for the State to assume to sell and convey the lands, because it may be asserted that the corporation retains real estate greater in value or for longer time than its charter allows.

There is no declaration of the statute in this case, that on failure of the company to sell within three years the title shall be forfeited or shall revert to the United States. On the contrary, by section 17 of the act of 1862, above quoted, the only forfeiture of title to lands declared in the law is for not completing the road within the period of time limited. It is *failure to complete* in time that is cause of forfeiture, *not lapse of time after completion.* Forfeitures are not favored in the courts. In this case, where forfeiture is intended, it is expressed. If forfeiture for other or further cause was intended, such other on additional cause of forfeiture would likewise have been expressed.

I.

Reverting to our first point, that *executive authority over the premises in contest terminated with the issuing of the patent,*—

We remark that the statutory provisions in the granting acts, are plain and unequivocal. Patent for the granted

lands must issue to the company. Act 1862, section 3, the grant is "to the said company."

Sec 4: "Patents shall issue conveying the right and title to said lands to said company." Act 1864—Sec. 21: "Before any land granted by this act shall be conveyed to any company or party entitled thereto under this act," &c.

The patent can emanate only to the company which is entitled thereto, as the party that has complied with the requirements of the law in reference to the construction of the railroad and telegraph, or to its assignee at its request. (Sec. 15, act 1862.)

When a patent has been issued, by the executive officers, in pursuance of law, and delivered to and accepted by the grantee, all control of the executive department over the title thereafter ceases.

Moore *vs.* Robbins, 96 U. S., 530.

The executive officers have power to execute and issue patents only in accordance with law. (Stockton *vs.* Williams, 1 Doug., Mich., 546.) And this doctrine is based on the special jurisdiction of Congress in the disposal of public lands.

Art. IV, Sec. 3, Constitution of the U. S.

The Pacific Railroad grants confer no authority upon the executive officers to convey the title of the granted tracts to any party besides the one who has complied with its precedent requirements in building the road, &c.

The right of the company to the patent for every tract granted vested in it on or before the completion of its entire road. "As between the United States and the company the right of the latter to a patent became perfect on the approval by the President of the report of the commissioners" appointed by him to examine and report upon the completion of the road in twenty-mile sections. (M. K. &

T. Railroad Company *vs.* Kansas Pacific Railroad, decided at this term of the court.)

The company, therefore, has had a vested right to a title for every granted tract, and has been capable of conveying that right since the acceptance by the President of the United States of the road opposite such tract.

Since the expiration of three years after full completion of the road, if settlers could have availed themselves on proper application to the company, of all the benefits designed to be given them by section third of the act of 1862; and if their proper applications have been refused, the courts were open. If this provision in the law is now in force the applicant for its benefits has been exposed to all the casualties and complications which might occur to the title of the company to any of its acquired lands by the acts of the company or its creditors, or the legislation of the States in which the lands lie.

If Congress intended that the granted lands should not be withheld indefinitely from *actual settlement*, speculators cannot complain that they are not for sale to every purchaser in indefinite quantities, at one dollar and twenty-five cents per acre, and that the right to buy a quarter section at a low price is limited to the individuals having the qualification of pre-emptors who settle upon and cultivate the lands.

And such qualified settlers, if they have a preference right of purchasing at a low price, in limited quantities, and their rights are not conceded by the companies holding the title, must accept the case as it is—and resort to the courts for redress.

The transfer, alienation, and descent of real property, and the effect of devises and conveyances thereof are governed by the laws and rules of construction in the several States where the property is situated.

McGoon *vs.* Scales, 9 Wallace, p. 23.

United States *vs.* Fox, 94 U. S., 315.

The application of these various laws to the various cases that might arise in the different States and Territories, is a matter of proper jurisdiction in the local courts, the government having parted with its title to the granted lands. On the other hand it is not at all congenial to the spirit and form of the Federal Government to have its executive officers at Washington dealing constantly with and deciding questions arising under State and Territorial laws, when such decisions between third parties can settle nothing. The exercise of such a jurisdiction by executive officers, would be an interference with the judicial power; and to justify such exercise full authority of law should be produced.

The statutes of subsequent date, which we have quoted above, sustain our view that Congress does not intend any interference by the executive power, with the title to the granted lands, after a patent was issued to the company, or after the company has acquired the right to such patent.

By the original act it was contemplated that the granted lands should be patented by the United States to the company, in quantities opposite to each completed section of road, immediately after such section was accepted by the United States, (Sections 4 and 7, act 1862,) that the lands along one section might be sold to aid in building another section of road just as the bonds could be used. But in 1864 it was known that this would not be practicable. A more dilatory method of patenting lands, beneficial and convenient to the United States, and likewise beneficial to the companies, was adopted.

By the act July 1, 1864, quoted above, fees were given to registers and receivers for lands located in their offices by the railroad corporations, and after these officers received the limit of their compensation, such fees went into the United States Treasury. The Commissioner of the Land Office was by that law authorized to prescribe regulations, and under the prescribed regulations the duly authorized

land agents of the companies were required to select the granted lands at the local land offices, and make lists of such lands, which lists were to be carefully examined by the local land officers, who were required to admit the location of such tracts only as were vacant and free from adverse claim, and not excepted by the terms of the grant, and to give certificates accordingly. A further tax in favor of the United States for costs of surveying and patenting the granted tracts, was fixed by the 21st section of the amended railroad grant, July 2d, 1864. These prescribed forms and payments superseded the positive requirement of section 7 of the act of 1862, that the Secretary of the Interior should set off the lands as fast as earned.

The companies had a corresponding benefit from the new enactments. They could apply for and take their lands on making these payments, and observing the prescribed formalities, "as the titles shall be required by said company," and the surveys of the granted lands could proceed from year to year at the convenience of the Government, and as fast as the companies might take titles, and pay the fees and costs, until all the lands should be surveyed, applied for, and patented.

The discretion as to rapidity of selection was largely lodged with the companies. It was never contemplated, that under section 3d of the act of 1862, the local land officers should admit pre-emptions upon the company's lands, based on settlements made before the survey of the lands, and that the companies, which, in the interests of the Government, as well as of themselves, had anticipated the limit of time for completing their roads, should lose the benefit of the granted lands by reason of their promptness in completing their roads, or by reason of the legally authorized delay of the executive officers in making surveys of such lands.

A further negative to the assumed power of the executive officers to deal with the title to the odd sections after the

acquisition of title by the companies, is given by the act of March 6, 1868, quoted above. That law deals with the even sections of land within the grants, and gives express authority to the Secretary of the Interior to restore them to market, and to dispose of them in a particular manner, at the price of $2.50 per acre.

It might be claimed that this law has repealed the provision in the act of 1862, which is brought into discussion in this case.

This later law deals with restoring withdrawn lands within the grant to market, and selling them; and it is passed at a time when the clause under discussion is about to take effect, by the lapse of three years after completion of the roads. The price fixed is $2.50 per acre, a different and higher price. This law does not mention the granted odd sections. No authority is given to restore them to market. They remain withdrawn, under positive requirements of the acts of 1862 and 1864. No increase in price is named for them. The legislature does not deal with them. If before this law the Secretary of the Interior, and his subordinate officers, had any jurisdiction over the granted lands by reason of lapse of time—since th is law, they have none. If the clause in the act of 1862 is not in full repealed as an obligation of law between the settler and the company, it is repealed so far as there may have been authority for executive officers to take jurisdiction. In this particular the case appears to us to be within the rule laid down by this Court in Murdock *vs.* City of Memphis, 20 Wallace, 590. The new law is complete in itself as the only rule for disposing of lands within the lateral limits of the grant by the Government land officers. They can sell no other lands within those limits, none at a different price.

It is not the intention of Congress that local land officers shall sell the company's lands at $1.25 per acre to preemptors, when they remain withdrawn, and without authority of law, or power in the Secretary of the Interior,

to restore them to market as public lands, and whilst the even numbered sections, with which the granted lands alternate, are held at two dollars and a half per acre.

And if authority of Government officers to sell the company's lands is not taken away by this law of 1868, then assuredly such authority never existed, or this law would not have remained silent in reference to the odd numbered tracts.

Again: the supposition that any control over the granted tracts, after completion of the road, (other than to execute patents to the grantees,) remains to-day in executive officers, involves incongruity with the act of Congress of 22d June, 1874, above quoted.

This act, in certain cases, authorizes the completion of pre-emption claims to granted tracts; but before such claims can be passed to entry and patent, the grantee must relinquish the contested tract and agree to accept other land in lieu thereof. This law deals directly with the subject matter of the granted sections claimed by settlers, and having been enacted more than three years after the completion of the roads, applies directly to claims made by settlers who have entered upon the lands since the expiration of three years, as well as to those who may have made prior settlements.

It is a conceded maxim of implied repeal, that where the incongruity of enactments is so marked as to justify the conclusion that the legislature did not intend that a particular enactment should remain in force, it is repealed.

Werner *vs.* Phelps, 36 Conn., 357.
Parrott *vs.* Stevens, 37 Conn., 93.
City of Sacramento *vs.* Bird, 15 Cal., 294.
State *ex rel.* Flack *vs.* Rogers, 10 Nevada, 319.

In England it has been held that if a particular enact-

ment is repugnant to the general course of subsequent legislation, it is repealed.

The India; Browning & Lush., 221.

Rex *vs.* Northleach & Whitney Road, 5 Barnewall & Adol., 978.

If the register and receiver of the local land office at Grand Island had, on the 21st of September, 1878, authority to sell the tracts involved in this case to the plaintiff, it would follow that they would, by law, be entitled to retain commissions therefor, which commissions would by so much reduce the amount of money held by the receiver, or by the United States Treasury for the railroad company, so that the company could not, in this way—if the money should ever be paid to it—obtain the full price. This would not accord with the requirement in the clause under discussion, "the price to be paid to said company."

We refer to paragraph 2238, Revised Statutes, which provides that "Registers and receivers, in addition to their salaries, shall be allowed, each, the following fees and commissions, namely: * * * Second. One per centum on all moneys received at each receiver's office."

If the local land officers have power to sell the land and take the price for it, they are authorized to retain to themselves a part of that price as fees and commissions.

It will also be noticed that the railroad company has already paid these officers the fee of $1 each, per quarter section, under the law of 1864—Paragraph 2238—item seventh, and on a second disposal of the land, they could demand and receive one per centum, or two dollars each, per quarter section; thus collecting compensation for a second sale of the same land. And if a second sale at the local land office is authorized by law, why not a second compensation to the officers—and so indefinitely, as many compensations as disposals?

II.

We are thus gradually brought to our second point.

The jurisdiction of registers and receivers of land offices, in admitting pre-emption claims and selling lands is restricted to the public lands of the United States.

Sales of land by these officers, under the pre-emption laws which had been previously granted and confirmed to a State, are illegal, and patents issued on such sales are void. This has been expressly decided in Riley *vs.* Wells, opinion by Justice Nelson, unreported case, December term, 1869, referred to by Justice Miller, in Williams *vs.* Baker, 17 Wallace, pp. 151, 152, also Crilley *vs.* Burrows, 17 Wallace, p. 167.

In these cases, Hannah Riley had a pre emption entry and patent for the northwest quarter of section 33, township 89 north, range 28 west, Iowa; and George Crilley had a pre-emption entry and patent for the southeast quarter of section 29, in the same township. These entries were made subsequent to the joint resolution of Congress of March 2, 1861, which had relinquished all title of the United States to *bona fide* purchasers from the State of Iowa. The title having been granted to such *bona fide* purchasers, subsequent sales and patents to pre-emptors were declared to be void.

See Williams *vs.* Baker, and Cedar Rapids Railroad Co. *vs.* Des Moines Nav. Co., 17 Wall., 144.

Registers and receivers have no power, except such as is expressly conferred by law, or regulations in pursuance of law.

"The head of the Land Department has no authority to direct or permit entries of land to be made in the local offices, unless in cases authorized by some act of Congress."

Parker *vs.* Duff, 47 Cal., 554.

The pre-emption laws apply to "all lands belonging to the United States," &c., not "included in any reservation by any treaty, law, or proclamation of the President, for any purpose." The settlement of the claimant having the requisite qualifications, must be made in person on the public land subject to pre-emption, (Rev. Stat., pars. 2257, 2258, 2259,) and this law does not confer the right on any one, "by reason of a settlement made on a tract theretofore disposed of," even if such disposal is suspended in the General Land Office by reason of some alleged defect; (par. 2271,) that is, even if such disposal is defective: much less if the disposal is complete and effectual.

The receiver of public moneys at a land office of the United States, has no authority of law, as a public officer, to sell the land or take the money of a private person or corporation, because no express authority of law is found making it an official act.

Nor has the Secretary of the Treasury any authority, in a case like this, to take the money paid by the plaintiff and place it in the United States Treasury; nor is there any law authorizing it to be taken from the Treasury and paid to the railroad company. If placed in the Treasury it could only be by it returned to the plaintiff, as purchase money of land erroneously sold. As the act of 1868, above cited, dealt with the matter of disposal of lands within the granted limits, fixed the manner of disposal, and the price where title remained in the United States, its silence as to the granted lands in odd numbered sections, is the expression of Congressional interpretation that no jurisdiction over such lands shall be exercised by executive officers.

The words in the clause under review providing that the granted tracts "shall be subject to settlement and pre-emption like other lands," are supposed to give sanction to the claim of executive jurisdiction over them. But it must be observed that these words are as necessary, and have similar force, when the claim of such jurisdiction is denied. It

is the same as though the words "like other lands" had read "like lands of the United States," which are the only other lands subject to settlement and pre-emption.

That the clause may impose a burden on the company having title,—not a duty upon executive officers—is clear from the other words in it,—viz: "at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company." The laws relating to sales of public lands properly fix a price *below* which they shall not be sold. They may, at public sale, or at private competition, be sold for *more*, but never for *less* than the minimum rate. Registers cannot agree for a less price, or receivers accept a less price than the minimum. *But here a maximum is not to be exceeded.* This burden, therefore,—if the clause under discussion is still in force as a part of the Pacific Railroad laws—rests directly on the company retaining title, and it may take a less price, but not a higher one, from the pre-emptor, and must sell to him, if at all, at not more, but to others may sell for more or less. This is clearer when we consider that the knowledge of the fact, whether the specific tract has or has not been "sold or disposed of by said company," is one within the knowledge of the company alone, and not in any manner within the knowledge of the United States officers. The companies are not required by law to report their land sales to the Government.

The Congress, in section 20 of the act of 1862, prescribed annual reports from the companies of all the facts in regard to stock, officers, line of road, expenditures, receipts, ineebtedness, &c., that in its wisdom it deemed important for the Executive Departments to have. By the act of 25th June, 1868, (15 Stat., p. 79,) if the companies failed to make full and satisfactory reports, the bonds and patents for land might be withheld. But nowhere is there a requirement that a report of land sales shall be made. If Congress intended that executive officers should sell the company's

lands for account of the companies, and without expense to them, reports of land sales would have been required annually or oftener, because they would furnish authentic information as to the particular tracts sold up to the period of the report; by comparing with the lists of granted lands, it could be seen at a glance whether any particular tract was or was not unsold when applied for by a preëmptor.

But no such report being required, it is plain that Congress saw no necessity for it, and it is equally plain that it would have been necessary if the executive officers were expected to sell the lands.

As the case now lies between the land officers and the companies, the latter may refuse to furnish information to the local land officers in respect to sale or disposal of a particular tract, and in that case, or indeed in any case, the applicant for an entry would proceed at his peril, for the land officers can make no decision that will protect him, in any respect. If he should take his entry and his patent, the question whether or not the company had made a prior sale or disposal, would be a judicial one, and the pre-emptor would have a lawsuit, with the probability of being dispossessed of the land, and losing the use of the money he had paid, for a long period of time.

On the other hand, if the clause under discussion can now be enforced, (which we deny,) the construction before suggested, viz., that the settler is to make his application and proof, and pay the price of the land to the company, and to enforce his claim judicially if he has a right and that right is denied—the matter is, in every respect, more simple and practical.

In the case at bar the plaintiff did not apply to the company for title, or offer to establish to its satisfaction his right as a pre-emptor, or pay or tender to it the price, which the law says is "to be paid to said company." Without this he has no equitable title to the premises,—no right

to demand from the company a conveyance of its title, or to have a decree for such conveyance.

His bill was, therefore, properly dismissed by the United States circuit court.

Respectfully submitted,

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For Appellees.